Filed 8/28/19 In re Noah S. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re NOAH S., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. CARLOS S., Defendant and Appellant.	F078562 F078434 (Super. Ct. No. JD137241-00) **OPINION**
In re NOAH S., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. Y.V., Defendant and Appellant.	F078748

APPEAL from orders of the Superior Court of Kern County. Raymonda B. Marquez, Judge.

Mara L. Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant Carlos S.

Julia E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant Y.V.

Margo A. Raison, County Counsel, and Kelli R. Falk, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

A Welfare and Institutions Code section 300[1] petition was filed on behalf of then 17-month-old Noah S. on April 25, 2017, by the Kern County Department of Human Services (department) and Noah was detained. Ultimately, reunification services were terminated as to Y.V. (mother) at the six-month review hearing and as to Carlos S. (father) at the 12-month review hearing, and a section 366.26 permanent plan hearing set. Prior to the section 366.26 hearing, father filed a section 388 petition seeking return of Noah to his custody under a family maintenance plan, which was summarily denied on November 16, 2018. The trial court subsequently terminated both parents' parental rights at the section 366.26 hearing December 13, 2018.

Father filed two separate appeals. In the first (case No. F078434) he appeals from the juvenile court order summarily denying his section 388 petition to return Noah to him with family maintenance services. Father alleges the denial was erroneous, contending he met the prima facie pleading requirements showing changed circumstances and best interests to the child. Father's argument is based, in part, on his claim that his marijuana use was legal and there was no evidence it posed any harm or risk of harm to Noah. In the second (case No. F078562), father contends the juvenile court erred by not finding the

---

1 All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

beneficial parent-child relationship exception to adoption applied to preclude termination of parental rights.

Mother filed a separate appeal (case No. F078748), asserting only that, if the judgment terminating father's parental rights is reversed, it would be grounds for reversing mother's termination of parental rights as well. (Cal. Rules of Court, rule 5.725(a)(1).)[2] Mother has not asserted any additional or separate arguments with respect to the termination of her parental rights.[3]

We reject father's contentions and therefore reject mother's contention as well.

STATEMENT OF THE FACTS

Detention

Seventeen-month-old Noah was placed into protective custody April 20, 2017, when law enforcement conducted a welfare check and mother and father were arrested for being under the influence of a controlled substance and cruelty to a child. Father acknowledged he was on drug diversion program probation and recently used drugs four to five days prior. Mother and father's home smelled of burnt marijuana and was covered in clutter and trash. There was no edible food in the house for Noah, and a pipe with burnt marijuana residue was on the dresser in the room where Noah slept.

The following day, April 21, 2017, father admitted to a social worker that he had used both methamphetamine and marijuana the previous day.

On April 25, 2017, the department filed a section 300 petition alleging Noah was at risk of harm due to his parents' substance abuse and their failure to provide adequate

---

[2] California Rules of Court, rule 5.725, subdivision (a)(1) provides, with few exceptions, that the juvenile court may not terminate the rights of only one parent under section 366.26.

[3] Following separate oral arguments in case Nos. F078434 and F078562, and waiver of oral argument in case No. F078748, for purposes of clarity and on this court's own motion, the appeals in case Nos. F078434, F078562 and F078748 are hereby ordered consolidated under case No. F078562 and all documents shall be filed in that case.

food, clothing, shelter or medical care. At the initial detention hearing April 25, 2017, father was elevated to presumed father status, Noah was detained, twice weekly supervised visits were ordered for both mother and father, and a jurisdiction/disposition hearing set for June 20, 2017.

Jurisdiction/Disposition

In the report prepared in anticipation of jurisdiction/disposition, father admitted using marijuana occasionally when he felt like using methamphetamine. The social worker encouraged father to reduce and eliminate the use of marijuana; father had tested positive for THC on May 9 and 17, 2017. Father enrolled in substance abuse counseling, but he continued to struggle with obtaining sobriety. The social worker recommended Noah be removed from his parents' custody and family reunification services be provided.

The hearing on June 20, 2017, was uncontested and the juvenile court found all allegations in the petition to be true. Noah was removed from mother and father's custody and family reunification services, not to exceed six months, were ordered. Father and mother were both ordered to participate in parenting, child neglect, and substance abuse counseling. Father and mother were both to submit to at least monthly random urine drug tests and advised that failure to test was considered a positive test. Supervised twice weekly visits were ordered. A six-month review hearing was scheduled for December 13, 2017.

First Section 388 Petition

On October 10, 2017, father filed a section 388 petition requesting Noah be returned to him under a family maintenance plan. According to father, he had completed his case plan and was testing clean for both his substance abuse class and the department. A section 388 hearing was set for November 1, 2017.

The department submitted a report for the hearing in which it confirmed father had completed his court-ordered parenting and substance abuse counseling. However, while

father tested negative for the department five times between June 26, 2017, and October 17, 2017, he failed to appear for six tests. On October 25, 2017, when the social worker spoke to father about the missed tests, father stated he forgets to test when he goes to work. But on October 31, 2017, father admitted to the social worker he had used marijuana two weeks prior.

The department recommended father's section 388 petition be denied as he admitted recent marijuana use, failed to submit to drug testing as ordered, and there were concerns about father allowing mother access to Noah at an unsupervised visit. On November 1, 2017, the juvenile court denied father's section 388 petition.

Six-Month Review

The six-month review hearing scheduled for December 13, 2017, was continued to February 5, 2018, to give mother notice. The report prepared in anticipation of the originally scheduled hearing indicated father tested positive for THC on October 31, 2017; he admitted he was "dirty" on November 10, 2017; and he tested positive for THC and methamphetamine on November 22, 2017.

Father's visits with Noah had been changed from supervised to unsupervised in October 2017 and were reported as being strong in quality. But father missed four visits in November 2017. The department recommended father's visits be returned to being supervised due to his positive drug tests and failure to attend recent visits. Father was again referred to substance abuse counseling but failed to re-enroll. The department recommended services for father be continued but terminated as to mother, as she failed to make acceptable progress or avail herself of the services provided.

The department submitted a supplemental report for the February 5, 2018, hearing. Between December 6, 2017, and January 18, 2018, father submitted three negative drug tests and one positive test for THC. He re-enrolled in substance abuse counseling on December 11, 2017. On January 3, 2018, the social worker discussed father's positive drug tests with him. While father stated he had not used methamphetamine since

November, he admitted using marijuana. The social worker discussed the importance of sobriety with father and encouraged him to work with the support system at his substance abuse counseling. Father stated he understood.

At the department's recommendation, the juvenile court ordered reunification services terminated as to mother, but continued for father to the next review date June 20, 2018. Father was again ordered to participate in substance abuse counseling and drug testing, and again advised that a failure to test would be considered a positive test.

12-Month Review

At the scheduled 12-month review hearing, father requested a contested hearing as the department was recommending terminating services and setting a section 366.26 hearing. The hearing was continued to August 6, 2018.

The department's report prepared in anticipation of the original hearing stated father submitted seven drug tests between February 8, 2018, and May 21, 2018, all positive for high levels of THC.

On April 3, 2018, the social worker contacted father's substance abuse counselor and learned that father was enrolled but had not attended since March 6, 2018. The case manager sent father a 10-day letter the previous week for lack of participation and had sent such a letter previously as well. A progress report for April 10, 2018, to May 4, 2018, indicated father attended three of nine scheduled sessions and tested positive for THC. Father's level of participation was said to be minimal and it was recommended father "start being honest with himself," attend at least two AA/NA meetings a week, obtain a sponsor or mentor, attend all three substance abuse sessions per week, and submit to all testing with negative results. Father's expected date of completion was October 10, 2018.

At a home visit on May 18, 2018, the social worker noted the smell of marijuana outside the home, but not inside. Father was asleep when the social worker arrived. When asked, father stated he was attending substance abuse counseling "sometimes," but

not always because he had to work. He had made no attempt to make up the missed sessions. According to father, he was not going to stop using marijuana because he needed it for anxiety, but that he would stop when he got Noah back. Father expressed he should be able to get Noah back even if he was using marijuana because it was legal.

During this six-month review period, father attended 19 of 23 visits with Noah. He left early three times without informing anyone. Father chose to have visits one time a week for four hours rather than twice a week for two hours each. At a visit February 15, 2018, father appeared to be under the influence at the visit and was observed with glassy eyes and slurred speech. He tested positive on this date.

The department submitted two supplemental reports in anticipation of the August 6, 2018, contested 12-month review. Father continued to use marijuana and tested positive for high THC levels twice in June and once on July 2018. When the social worker discussed the case plan with father, he stated he was enrolled in substance abuse counseling and attended when he could. According to father, he last used marijuana on July 9, 2018, and wanted to show that his marijuana levels were dropping, although he admitted not using marijuana was difficult. The social worker spoke to father's substance abuse counseling case manager, who reported that father last attended substance abuse counseling on June 27, 2018, and was again at risk of being dropped from the program. Due to father's consistent positive testing for THC and minimal participation in counseling, the department recommended terminating services for father.

At the August 6, 2018, hearing, father stated he had been able to attend substance abuse counseling more regularly as of late, but he had not obtained a sponsor or attended AA/NA meetings due to work. Father testified he had obtained a medical marijuana card four to five months prior for dealing with the depression of not having custody of Noah. Father stated he used medical marijuana twice a month and, if Noah was in his custody, he would have the drug locked up and have his sister care for Noah while he used. According to father, he last used methamphetamine in November 2017, when his petition

to have Noah returned was denied. When asked how he now coped with disappointment, father stated he talked to classmates at substance abuse counseling and continued to use medical marijuana.

On cross-examination, father was asked if he had tried other means of dealing with depression. Father stated a doctor recommended counseling, but he preferred medical marijuana, and believed talking to his classmates at his substance abuse class about being depressed was sufficient counseling. Father asked that Noah be returned to his custody but, if not, that he be given additional reunification time.

The juvenile court, in its ruling on August 17, 2018, noted that Noah had been in protective custody for 16 of his 33 months. The juvenile court reviewed father's drug testing results, his lack of compliance with counseling, the reasons Noah had been originally placed into protective custody, and father's failure to follow the recommendations of trained professionals, which showed a lack of capacity to complete the objectives of the treatment plan. And while father claimed he used marijuana twice a month, the test result proved otherwise, showing a lack of progress on the issue of substance abuse. The juvenile court ordered father's reunification services terminated and a section 366.26 hearing set for December 13, 2018.

Writ Petition

On September 20, 2018, father filed an extraordinary writ with this court seeking reversal of the juvenile court's order terminating reunification services and setting a section 366.26 hearing, asserting there was no evidence of risk to Noah if he was returned to father or, alternatively, if there was risk, services should have been continued to the 18-month date. The writ petition was denied. (See case No. F077986.)

Second Section 388 Petition

On November 13, 2018, father filed a second section 388 petition seeking to have the juvenile court change its order terminating reunification services and setting a section 366.26 hearing. Father requested that Noah be placed with him with family maintenance

services. As changed circumstances, father stated that, since the termination of reunification services, he completed his substance abuse treatment and had a "high degree of interest/involvement and a detailed recovery (sobriety) plan," which would allow Noah to live in a clean and sober home with him. Father attached a certificate of completion and progress reports dated October 19, 2018, from his substance abuse program, which indicated he had last tested positive on July 24, 2018, and submitted four negative tests since. Father now had 12 weeks of sobriety. The progress report stated father "is putting his plan into action."

On November 16, 2018, the juvenile court denied father's request, as the petition stated no new evidence or changed circumstances. On November 26, 2018, father filed an appeal on the juvenile court's denial of his request for a hearing pursuant to section 388. (Case No. F078434.)

Section 366.26 Hearing

For the December 13, 2018, section 366.26 hearing, the department submitted a report recommending parental rights be terminated and Noah freed for adoption. The attached adoption assessment stated that Noah had been in the same resource family home placement since April 21, 2017, a day after being placed in protective custody. Noah's medical and dental needs were being met, and he was developmentally on track.

Mother visited Noah 91 out of a possible 158 visits. Father visited Noah 125 out of a possible 158 visits. Many of the visits occurred with both parents present. Father also had one-on-one visits with Noah, as well as unsupervised two-hour visits at the department between October 2017 and January 2018.

The adoption assessment documented visits beginning in April of 2017 through October 2018. In visits where both parents were present, both were affectionate with Noah and engaged in age appropriate play with him. However, they would also argue over who was to blame for Noah being in protective custody, what to feed him, or other relationship matters. At one visit, father told Noah to "look at your ugly mom." The

arguing and name calling occurred in front of Noah and would result in Noah being ignored or one parent leaving early. While Noah hugged and kissed mother and father goodbye at the end of the visits, he showed no concern at returning to the waiting caregiver. During one of father's one-on-one visits with Noah, father gave his full, nurturing attention to Noah. During another visit, father fell asleep and only woke when Noah began to slap the couch where father was sleeping.

The adoption assessment noted Noah was 17 months old when he was removed from his parents and spent almost half of his life out of his parents' care. Noah did not look to his parents to meet his daily physical and emotional needs, and the social worker opined that permanency was in Noah's best interest. According to the social worker, the benefits of adoption outweighed any detriment caused by severing Noah from his parents.

The adoption assessment stated that Noah was considered to be generally adoptable, due to his age and lack of any developmental or medical concerns. The current caregivers were committed to adopting Noah.[4] The social worker did not believe it would be difficult to find another adoptive home if the current caregivers were unable to adopt Noah.

Mother did not attend the December 13, 2018, section 366.26 hearing. Mother's counsel objected to the juvenile court's finding of proper notice. Father was present and asserted the beneficial parent-child exception to adoption, based on the visits documented in the report, as well as evidence in the file.

The juvenile court found father participated in approximately 80 percent of the scheduled visits, which met the "statutory requirement" of the first prong of the beneficial parent-child exception to adoption. However, as to the second prong, the juvenile court

---

[4] By this point, Noah had a younger sibling, age one month, who was detained from mother on October 4, 2018, and placed into the same home as Noah. The caregivers were willing to adopt the younger child as well, if he became available for adoption. The younger child is not at issue here.

found father failed to show that severing his relationship with Noah would deprive Noah of a substantial, positive, and emotional attachment, such that Noah would be greatly harmed. The juvenile court found that, while father could "demonstrate frequent and loving contact," "a pleasant visit[] with the child" was not sufficient to meet the requirements of the adoption exception. The juvenile court found Noah was likely to be adopted and terminated mother and father's parental rights.

DISCUSSION

I. THE JUVENILE COURT DID NOT ERR IN SUMMARILY DENYING FATHER'S REQUEST FOR A SECTION 388 HEARING

Father alleges the juvenile court's order denying a hearing on his section 388 petition was erroneous because he met the prima facie pleading requirements of a section 388 petition, showing changed circumstances and best interests to Noah. Father bases his argument, in part, on what he alleges is the juvenile court's error in relying on father's marijuana use in denying the petition. As argued by father, his marijuana use was legal and there was no evidence in the record of any harm or risk of harm to Noah based on his marijuana use. We disagree and affirm.

Applicable Law and Analysis

Under section 388, a juvenile court order may be changed or set aside "if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*Ibid.*; § 388, subd. (d) ["If it appears that the best interests of the child ... may be promoted by the proposed change of order, ... the court shall order that a hearing be held."].) "To support a section 388 petition, the change in circumstances must be substantial." (*In re Ernesto R.* (2014) 230

Cal.App.4th 219, 223.) To require a hearing on the merits of the petition, a mere showing of "changing circumstances" is insufficient. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.) The prima facie requirement is not met "unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra,* at p. 806.)

We review the juvenile court's order denying a hearing for abuse of discretion. (*In re Zachary G.*, *supra,* 77 Cal.App.4th at p. 808.) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

Father contends the juvenile court should have held a hearing on his section 388 petition because he established a prima facie showing of changed circumstances and that offering him placement of Noah with family maintenance services would be in Noah's best interests. Father alleged his changed circumstances consisted of completing substance abuse treatment October 19, 2018, "with excellent progress and a high degree of interest/involvement and a detailed recovery (sobriety) plan." Father requested Noah be placed with him with a family maintenance plan, as that would "allow the child to live in a clean and sober home with a caring and loving father who has changed his life for the better."

Respondent counters that father failed to meet the threshold prima facie requirements because the petition stated no new evidence or changed circumstance. Respondent cites to father's past failures at maintaining sobriety, both prior to and after Noah's detention and that, at the time of the petition, father had only 12 weeks of sobriety, which was achieved only after reunification services were terminated.

Noah was originally detained and father arrested for being under the influence of marijuana and methamphetamine and cruelty to a child. Although father was on drug diversion program probation at the time of his arrest, he had used drugs that day. The home where Noah was kept smelled of burnt marijuana, was covered in clutter and trash,

and there was no edible food in the house for Noah. A pipe with burnt marijuana residue was on the dresser in the room where Noah slept.

We agree with the juvenile court that father's petition fell short of establishing the kind of prima facie showing that might have merited a hearing. Following 18 months of services—which included mandatory substance abuse counseling that father attended only intermittently and in which father had reoccurring relapses in drug use, both marijuana and methamphetamine—evidence of 12 weeks of sobriety and completion of substance abuse counseling is not sufficient evidence to make a prima facie case of changed circumstances. As stated in *In re Kimberly F., supra,* 56 Cal.App.4th at page 531, footnote 9, "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."

At this point we address father's claim that the juvenile court abused its discretion when it based its denial of the petition on his marijuana use when "there was no evidence that his prior, occasional use of marijuana caused any harm to [Noah]." Father cites law that allows for both medicinal and recreational marijuana use. Father is correct that the question is not whether his conduct was legal but whether it endangered Noah. Despite father's claim to the contrary, we note that his marijuana use did place Noah at a risk of harm.

In support of his argument, father cites *In re David M.* (2005) 134 Cal.App.4th 822, abrogated on other grounds in *In re R.T.* (2017) 3 Cal.5th 622, 628, in which two-year-old David was removed from his parents' custody after his mother tested positive for marijuana during the birth of David's sibling. David's mother was alleged to have a history of mental illness and marijuana use, and David's father was alleged to suffer from an anxiety disorder and depression. (*In re David M., supra,* at pp. 825–826.) The parents appealed the juvenile court's jurisdictional findings, and the Court of Appeal reversed. The Court of Appeal found substantial evidence that both parents suffered from mental health issues and that mother abused marijuana. However, the court said, there was no

evidence that David and his sibling had been harmed, or were at substantial risk of harm, as a result of mother's drug use or the parents' mental health issues. The court explained: "The evidence was uncontradicted that David was healthy, well cared for, and loved, and that mother and father were raising him in a clean, tidy home. Whatever mother's and father's mental problems might be, there was no evidence those problems impacted their ability to provide a decent home for David." (*Id.* at p. 830.)

However, father's case is distinguishable from *In re David M.* Unlike that case, where there was no evidence that the parents' mental health issues and marijuana use impacted their ability to appropriately care for their children, there was substantial evidence before the juvenile court in this case that father's marijuana use was part and parcel of his inability to properly care for Noah.

When Noah was detained in April of 2017, law enforcement found both mother and father under the influence of methamphetamine and marijuana. Father admitted to using methamphetamine and marijuana that day. This was not an isolated incident. When Noah was born, both mother and Noah tested positive for methamphetamine. When Noah was a month old, father, while under the influence of methamphetamine, pushed mother while she was holding Noah, resulting in a bruise on Noah's thigh. Father was subsequently convicted of being under the influence in February 2016 and sentenced to participate in substance abuse treatment. He continued to abuse substances, as evidenced by the facts of April 20, 2017.

At the time Noah was detained, Father's substance abuse impaired his ability to meet Noah's needs and placed Noah at risk of harm. The family residence was found by law enforcement to be dirty and uninhabitable, there was inadequate food in the home, the home was covered in large piles of trash, and Noah's bed was a daybed turned on its side. A glass pipe with burnt residue was found on the dresser in the room where Noah slept. When father spoke to a social worker the day after Noah was detained, father stated that he relapsed and used drugs when he experienced stress, especially when

dealing with mother. He also insisted that law enforcement lied about the condition of the home. In May of 2017, after two positive drug tests for marijuana, father stated he smoked marijuana when he felt the urge to use methamphetamine.

The report in anticipation of the six-month review hearing in December of 2017, stated father had numerous positive drug tests (six of which were failures to appear), including a positive test for methamphetamine as recently as November of 2017, despite the fact he completed substance abuse counseling in September of 2017. He was again referred for substance abuse counseling, but he failed to re-enroll.

In August 2018, in the report prepared for the contested 12-month review hearing, the department reported father continued to use marijuana and tested positive for high THC levels twice in June and once in July 2018. When the social worker discussed the case plan with father, he stated he was enrolled in substance abuse counseling and attended when he could. According to father, he last used marijuana on July 9, 2018, and wanted to show that his marijuana levels were dropping, although he admitted not using marijuana was difficult. The social worker spoke to father's substance abuse counseling case manager, who reported that father last attended substance abuse counseling on June 27, 2018, and was again at risk of being dropped from the program due to lack of attendance. Due to father's consistent positive testing for THC and minimal participation in counseling, the department recommended terminating services for father.

At the 12-month review hearing, father testified he had been able to attend substance abuse counseling more regularly as of late but had not obtained a sponsor or attended AA/NA meetings due to work. According to father, he obtained a medical marijuana card four to five months prior for dealing with the depression he experienced after losing custody of Noah. Father stated he used medical marijuana twice a month and, if Noah was in his custody, he would lock up the drug and have his sister care for Noah while he used. According to father, he last used methamphetamine in November 2017, when his petition to have Noah returned was denied. When asked how he now

coped with disappointment, father stated he talked to classmates at substance abuse counseling and continued to use medical marijuana.

On cross-examination, father was asked if he had tried other means of dealing with depression other than marijuana use. Father stated a doctor recommended counseling, but he preferred medical marijuana, and he believed talking to his classmates at substance abuse class about being depressed was sufficient counseling.

In terminating father's reunification services, the juvenile court reviewed father's drug test results, his lack of compliance with counseling, the reasons Noah had been originally placed into protective custody, and father's failure to follow the recommendations of trained professionals, which showed a lack of capacity to complete the objectives of the treatment plan. The juvenile court also noted father's inconsistent accounts of why and when he used marijuana, claiming at one point that he used it twice a month, but that the test results proved otherwise, showing a lack of progress on the issue of substance abuse.

The section 388 petition was filed in November 2018, just three months after the hearing terminating reunification services. We see no abuse on the part of the juvenile court in finding no prima facie showing of changed circumstances within this short time span.

In any event, even assuming error in finding there was no prima facie showing of changed circumstances, father failed to make a prima facie showing that granting the section 388 petition and returning Noah to his care with additional services was in the child's best interests.

Parent and child share a fundamental interest in reuniting up until reunification efforts cease. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697, disapproved on another point in *John v. Superior Court* (2016) 63 Cal.4th 91, 98–100.) By the time of the section 366.26 hearing to select and implement a child's permanent plan, however, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th

242, 254.) After reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) This is a difficult burden to meet when reunification services have been terminated. This is because, "[a]fter the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464 (*Angel B.*).) In fact, there is a rebuttable presumption at this point that continued foster care is in the child's best interest. (*Ibid.*) Such presumption applies with even greater strength when adoption is the permanent plan. (*Ibid.*) "A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

At the time father filed his section 388 petition, three months after reunification services were terminated, Noah's interest in stability was the juvenile court's foremost concern, outweighing any interest in reunification. Noah required permanency and stability, which he received in his caregivers' home. The caregiver family wished to adopt Noah. Returning Noah to father's care with family maintenance services would only delay Noah's adoption in a stable and loving home. The juvenile court reasonably concluded that, under such circumstances and in light of father's history of abusing drugs and failing to follow through on substance abuse treatment or counseling, father had not made a prima facie showing that returning Noah to his care with family maintenance services would have promoted stability for Noah or be in his best interests. (*Angel B., supra,* 97 Cal.App.4th at p. 464.)

In *Angel B., supra,* 97 Cal.App.4th 454, the court rejected the mother's contention the juvenile court erred in denying her section 388 petition without holding a hearing. The mother in *Angel B.* had a long history of drug abuse, unsuccessful rehabilitation attempts, and failure to reunify with another child. After the mother was denied

reunification services, she began to improve, enrolling in a treatment program, testing clean for four months, completing various classes, and obtaining employment. Regular visits with her child also went well. (*Angel B., supra,* at p. 459.) Nevertheless, when she filed her section 388 petition for reunification services, the court summarily denied her petition without a hearing. The Court of Appeal affirmed, finding no abuse of discretion by the juvenile court refusing to hold a hearing. (*Angel B., supra,* at p. 462.)

The appellate court in *Angel B.* acknowledged the petition showed the mother was doing well, "in the sense that she has remained sober, completed various classes, obtained employment, and visited regularly with [the child]." (*Angel B., supra,* 97 Cal.App.4th at pp. 464–465.) The court also assumed for purposes of the appeal "that this time her resolve is different, and that she will, in fact, be able to remain sober, remain employed, become self-supporting and obtain housing." (*Id.* at p. 465, italics omitted.) But, the court concluded "such facts are not legally sufficient to require a hearing on her section 388 petition." (*Ibid.*) The court explained: "[T]here is a rebuttable presumption that, in the absence of continuing reunification services, stability in an existing placement is in the best interest of the child, particularly when such placement is leading to adoption by the long-term caretakers. [Citation.] To rebut that presumption, a parent must make some factual showing that the best interests of the child would be served by modification." (*Ibid.*) The mother in *Angel B.* did not make such a showing. Nor does father here.

Based on the foregoing, the juvenile court did not abuse its discretion in summarily denying father's section 388 petition without a hearing.

II. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED THAT THE BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION TO ADOPTION DID NOT APPLY

Father also contends the juvenile court erred when it determined the beneficial parent-child relationship exception to adoption of Noah did not apply. He argues the

evidence clearly showed he and Noah shared a strong parent/child relationship. We disagree.

Legal Principles and Standard of Review

To provide stable, permanent homes for dependent children, section 366.26, subdivision (b) requires the juvenile court to select a permanency plan for a child. (*In re Maria Q.* (2018) 28 Cal.App.5th 577, 593–594.) If a child is adoptable, as Noah is, there is a strong preference for adoption over the alternative permanency plans. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.) If the court determines that a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343–1345.)

One exception to termination of parental rights applies where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315–1316.) "'[B]enefit from continuing the ... relationship'" means the parent-child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).) "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

"We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the

determination of whether there is a compelling reason for finding that termination would be detrimental to the child." (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.)

Analysis

In support of his argument, father cites the many positive reported interactions he had with Noah. He asserts the undisputed evidence shows he regularly visited his son, demonstrated a parental role with him, responded appropriately to his needs, and that he was bonded with him. The juvenile court agreed that father regularly visited Noah, but that his relationship with him was not parental in nature. A judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 230.)

The record shows that father and Noah did have regular visits and that Noah appeared to enjoy his time with father. Father was often appropriate and loving in his interactions with Noah, but at times he also displayed inappropriate behavior by showing up to a visit under the influence, engaging in arguments and name-calling with mother, leaving visits early when he was upset, and falling asleep when he was supposed to be interacting with Noah. While Noah appeared to be upset on a few occasions when father left, he was easily soothed and stopped crying when he was informed he was going to see his caregiver. Thus, the juvenile court could reasonably conclude that father's relationship to Noah was not parental in nature.

Noah spent over half his very young life with his caregiver family and, according to the adoption assessment, the father/child relationship "diminished considerably" over that time period. The assessment stated that father had a "visiting relationship" with Noah and that the caregivers had taken on the primary parental role. Noah now looked to his caregivers for his daily physical and emotional needs.

Father's counsel, in addressing the beneficial parent-child relationship exception, argued the description of the visits in the various reports, "as well as other evidence

contained in the file," supported a finding that the second prong had been met. When asked by the juvenile court if there was anything "in particular" counsel wished the juvenile court to take note of, counsel stated, "No."

The juvenile court, in addressing the second prong of the beneficial parent-child relationship exception, found father had not met his burden of showing that his relationship to Noah promoted Noah's well-being to such a degree that it outweighed the well-being Noah would gain from a permanent home with adoptive parents. The juvenile court found father also failed to show that severing the relationship would deprive Noah of a substantial, positive, emotional attachment such that Noah would be greatly harmed.

Substantial evidence supports the juvenile court's conclusion that Noah would not benefit from continuing his relationship with father to the extent that preserving that relationship would outweigh the benefits he would gain in a permanent home with new, adoptive parents. (*Autumn H., supra,* 27 Cal.App.4th at p. 575.) We further conclude father has not carried his burden on appeal to show that the juvenile court abused its discretion by finding that the benefit of Noah continuing his relationship with father would not outweigh the benefit to Noah of a permanent home with adoptive parents and finding a permanent plan of adoption was therefore in Noah's best interests. (*In re J.C.* (2014) 226 Cal.App.4th 503, 530–531.)

III. MOTION TO TAKE ADDITIONAL EVIDENCE

We touch briefly on one other point. While this appeal was pending, father brought a motion asking us to take additional evidence pursuant to Code of Civil Procedure 909, for an order making factual determination in these appeals, and permitting further briefing and/or remand to the juvenile court for consideration of this new information. In the motion, he offered to present evidence of the following: On May 31, 2019, father was granted custody of his eight-month-old son Josiah, with family maintenance services. He also asks that we make the factual determinations, based on this evidence, that Noah and Josiah are full brothers who previously lived together in the

same foster home for seven months, but that neither the May 31, 2019, dispositional order placing Josiah with father nor the earlier December 13, 2018, section 366.26 order terminating father's parental rights to Noah included a sibling visitation order. In light of this evidence, father asked that we remand the matter back to the juvenile court to revisit the section 388 petition to address changed circumstances and the section 366.26 hearing to address the sibling relationship exception and visitation.

We deny the motion. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 400 [except in "rare and compelling case," appellate court may not receive and consider postjudgment evidence to reverse the judgment].) We follow the general rule that we consider the correctness of the juvenile court's order "'as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.'" (*Id.* at p. 405.) Nothing in the proffered evidence calls into question the juvenile court's conclusion that, at the time of the section 388 hearing, father's circumstances had not sufficiently changed, nor that, at the time of the section 366.26 hearing, the parent-child relationship exception warranted an exception to adoption for Noah. This is not the "rare and compelling case" in which new evidence is appropriately considered on appeal. (*Id.* at p. 400.)

DISPOSITION

The November 16, 2018, order denying father's section 388 petition and the December 13, 2018, order terminating father's parental rights are affirmed.

_____
FRANSON, J.

WE CONCUR:

_____
HILL, P.J.

_____
SMITH, J.